

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.26 of 1998

Vijaykumar Popatlal Shah ..Appellant
(Orig. plaintiff)

V/s

Baban Anand Mhambre .. Respondent
(Orig.defendant)

Shri Vinod V. Savaji with P.B.Shah for appellant
Shri Uday Warunjikar with Violas Tapkir for
Respondent

CORAM:S.R.SATHE, J.

DATED:1st Sept. 2004

ORAL JUDGMENT :-

1. The Appellant original plaintiff in Special Civil Suit NO.66 of 1991 has preferred this appeal against the judgment and order passed by the 5th Additional District Judge, Pune in Civil appeal No.522 of 1992 whereby the judgment and order decreeing the plaintiff's suit was set aside, the appeal was allowed and plaintiff's suit was dismissed.

2. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and

defendant.

3. The brief facts giving rise to this second appeal are as under :-

. The plaintiff is having a cloth shop at Chakan, Taluka Khed, District Pune. The defendant was also dealing in cloth business and as such he used to purchase cloth from plaintiff's shop on credit. As the defendant was acquainted with the plaintiff and he was in need of money to meet the medical expenses, on 22-1-1998 he approached the plaintiff and requested him for a hand loan. Accordingly, plaintiff gave hand loan of Rs.2500/- to the defendant and the defendant executed a writing Exh.36. Thereafter again the defendant was in need of money to meet the marriage expenses of his daughter and for that purpose he approached the plaintiff and took loan of Rs.18,000/- and executed the writing dated 21-4-1989. Both the above mentioned amounts were advanced free of interest. Then on 11-6-1990 the defendant issued a notice to the plaintiff and informed him that the plaintiff got the documents executed from him i.e. defendant by bringing pressure on him. The plaintiff gave reply to the said notice and then on 4-8-1990 he issued notice to the defendant and called upon him

to return the amount advanced to him by way of loan along with interest. In spite of receipt of the notice the defendant neither replied the notice nor paid the amount. Hence the plaintiff filed Special Civil Suit NO.66 of 1991 on 9-1-1991 in the Court of C.J.S.D., Pune.

4. The defendant filed his written statement at Exh.28 and resisted the suit claim on several grounds. Firstly, he contended that he used to purchase cloth from the plaintiff's shop in large quantity. According to him he was not at all in need of money to meet the medical expenses and he had never taken loan of Rs.2500/- for that purpose from the plaintiff. He also denied plaintiff's allegation that loan of Rs.18000/- was given to him to meet the marriage expenses of defendant's daughter. He admitted that the plaintiff had replied the notice issued by him and contended that signature was obtained by the plaintiff under coercion. According to him he had purchased cloth for Rs.5000 to Rs.5500/- and had deposited amount of Rs.1500/- with the plaintiff. However the plaintiff falsely issued notice and claimed the amounts mentioned therein. He also contended that plaintiff had filed another suit bearing Suit NO.151 of 1990 claiming amount of rs.30,000/- and

cheated him and he therefore contended that the plaintiff's suit be dismissed. On these pleadings the trial court framed issues on Exh.29. After considering the evidence adduced by both the parties the trial Court came to the conclusion that the plaintiff has proved that the amount of Rs.2500/- and Rs.18,000/- were advanced to the defendants and defendant had failed to establish that the writings were got executed by coercion. The trial court therefore decreed the suit in plaintiff's favour.

5. Being dissatisfied with the above said order the defendant filed Civil Appeal No.522 of 1992. The first appellate Court found that there was substance in the contention of the defendant that writings in question were got executed by coercion. According to the first appellate court the plaintiff took unfair advantage of his position and got the said documents. He therefore held that the plaintiff has failed to prove that amount of Rs.2500/- and Rs.18,000/- was advanced to the defendant. As a result of the same the first appellate court allowed the appeal and dismissed the plaintiff's suit.

6. The original plaintiff has challenged the above

mentioned judgment and order passed by the first appellate Court. From perusal of the record it appears that at the time of admission, this Court on 2-3-1998 passed the following order:

"Heard. Admit. Substantial question of law raised at grounds (1) and (2).

The said grounds reads as under :-

1. The learned Judge failed to consider the acknowledgment receipt of the loan at Exh.36 and 37 property. On going through the contents of both these documents it is clear that the amount was paid without interest.

2. The learned appellate Court failed to consider that under Sec. 2 sub sec. (9) of the Money Lending Act, it is necessary that the amount must be advanced with interest. From the document it is clear that the amount was not advanced with interest and, therefore, the learned appellate court wrongly held that the plaintiff was doing money lending business".

7. In this Second appeal before me, Mr.Savaji learned advocate for the original plaintiff has urged two points. Firstly, he submitted that the first appellate Court has not at all taken into consideration two writings executed by defendant and the effect of the said writing. Secondly, he canvassed before me that the first appellate Court wrongly held that documents in question were got executed by coercion. He therefore submitted that appeal be allowed and suit be decreed in plaintiff favour. As against this Mr.Walunjikar, learned Advocate for the original defendant submitted that no question of law much less substantial question of law is involved in second appeal and as such the appeal in fact is not maintainable. In the alternative he submitted that even if it is held that there is substantial question of law still the finding recorded by the first appellate court is legal and correct and as such there is no such necessity to interfere with the said finding.

8. From perusal of the pleadings as well as the evidence on record it is very clear that admittedly the plaintiff and defendant were known to each other prior to the suit transaction. Not only that but defendant had definitely made purchases on

credit from the plaintiff's shop, prior to the suit transaction. The plaintiff has in fact deposed that as defendant used to purchase cloth from his shop he was well acquainted with him and as such on 22-1-1988 defendant approached him and requested for hand loan of Rs.2500/-. Accordingly, he paid the said amount and defendant executed the writing Exh.36. If we peruse the said writing it is very clear that therein defendant has admitted the receipt of amount of Rs,.2500/- and it was further agreed that the said amount was given free of interest and right was given to the plaintiff to recover the expenses and advocate's fees in case the amount is not paid within stipulated period which was 1 month and 15 days. The defendant has however contended that the document Exh.36 does not bear his signature. The plaintiff has stated that defendant has signed the said document in his presence. There is no reason to disbelieve this statement of the plaintiff. Moreover we find that defendant had issued notice (Exh.49) dated 11-6-1990 to plaintiff wherein he had averred that on 10-6-1990 the plaintiff had been to his house along with some other persons and the said person and plaintiff gave threat to him and at that time his signature was obtained on one blank paper on which revenue stamps were affixed. Taking into

consideration this averment and the fact that present writing Exh.36 is also one on which revenue stamps are affixed and defendant's signature is obtained on the same, it cannot be said that the said signature is not of his. The said contention cannot be accepted. The question arises whether it is necessary for the plaintiff to prove independently that amount of Rs.2500/- was advanced to the defendant. It appears that the said writing in fact bears the signature of the defendant. Merely because the plaintiff has not adduced any other evidence, it cannot be said that the plaintiff's story regarding advance should be disbelieved. There is also another aspect of the matter. Admittedly plaintiff had issued notice Exh.42 to the defendant wherein he had said that such amount has been advanced to the defendant. Admittedly, the defendant has not given any reply to the said notice. Non giving of reply speaks volume. Once Exh.36 is proved it has to be held that the plaintiff has proved that amount of Rs.2500/- was advanced to the defendant.

9. The plaintiff has also deposed that on 21-4-1989 the defendant had been to him and at that time amount of Rs.18,000/- was given to the defendant as he was in need of money to meet the

marriage expenses of his daughter. Incidentally it must be noted that defendant has clearly admitted in his cross examination that marriage of his daughter took place at that time and for that he was in need of money. Here again we find that besides the writing Exh.37 there is no other independent evidence to show that such amount was actually advanced. Much is made about the fact that plaintiff has not produced any books of account to show that such amount was actually given to the defendant. However, the plaintiff has stated that he used to maintain books account in respect of his business, but for his personal transaction he has not maintained books of account so under such circumstances merely because he has not produced any other independent evidence to show that such amount was advanced, I am not inclined to hold that the plaintiff has failed to prove that the amount of Rs.18,000/- was advanced to the defendant particularly when we find that signature on Exh.37 is admitted by the defendant. It must be noted that Exh.37 is written on a stamp paper which is admittedly purchased by the defendant. Not only that but it appears that the said stamp paper has been purchased by defendant about 6/7 days prior to the execution of the said document. At one stage defendant has contended that when the plaintiff had

been to his house along with some other person he obtained defendant's signature on the document which was already written. Considering the fact that stamp paper was in fact purchased by the defendant and that too 6/7 days prior to the execution of the document Exh.37 and it is not the case of the defendant that after purchasing the said stamp paper he had handed over the same to plaintiff and subsequently at some point of time the same stamp paper was used, it must be held that there is no substance in the contention of the defendant that his signature was obtained by plaintiff at exh.36 and 37 by coercion. In fact it is well settled that when contention with regard to coercion or fraud is taken by the defendant it is necessary for the defendant to give details about the same and to adduce very cogent and convincing evidence in that behalf. If really plaintiff and some other person had been to the defendant's house and had given such threats then defiantly defendant would not have kept mum at that time. It is not the case of the defendant that the plaintiff had given threats at plaintiff's house but on the contrary as per defendant's version plaintiff had gone to the defendant's village and had given the threats, so under such circumstances if really such things would have happened the defendant would have

filed a complaint against the plaintiff. So the conduct of the defendant also indicates that there is no sustenance in the contention taken by him. It has also come on record that defendant never lodged any complaint about the alleged incident of threat. Then it also appears that with a view to create some fear in the mind of plaintiff or with a view to have some defence in future, the defendant might have issued notice dated 11-6-1990 Exh.49. The defendant had kept mum at the time when actually specific notice was issued by the plaintiff to him calling upon him to make the payment. However, from the judgment of the first appellate court it appears that the first appellate court has given undue importance to the fact that the plaintiff has not adduced any other independent evidence to prove the payment and fact that the plaintiff is in better financial position while defendant was a needy person. However, while doing so, the first appellate court has over looked the fact that the burden was in fact on the defendant to prove that the document in question was got executed under coercion but defendant failed to discharge the said burden. I therefore think that plaintiff has proved his case and he is entitled to recover amount of Rs.2500/- and Rs.18,000/- from the defendant.

10. From perusal of the plaint it appears that the plaintiff has claimed 18% interest on the above mentioned amount. In the writing Exh.36 as well as Exh.37, it is specifically mentioned that amount is advanced free of interest. It must also be noted that there is no stipulation in the agreement that if the amount is not paid within specific period then the plaintiff would be entitled to interest. All that is mentioned in the said writing is that if the amount is not paid in time, the plaintiff is entitled to get the advocate's fees and court expenses. So under such circumstances I am of the view that the plaintiff is not entitled to get amount of interest as claimed. It is, therefore, necessary to pass the following order:

. The appeal is allowed.

. The order passed by the first appellate court is set aside. Plaintiff's suit is partly decreed. The defendant is directed to pay amount of Rs.20,500/- (Rupees twenty thousand and five hundred) and future interest on the said amount at the rate of 6% p.a. from the date of the suit till realisation of the amount.

. The defendant to pay plaintiff the proportionate costs of this suit and bare his own.

Certified copy expedited.

(S.R.SATHE, J)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 869 of 2002

In
Second Apepal No.613 of 2002

Bhagwanda SK. Mulchandani..Applicant

V/s

Lalchand R. Khatri and Ors...Respondents

Ms Suhasini Mutalik for Applicant

Mr.Dhjananjay Lonkar for Respondent no.1

Mr.R.G.Ketkar for Respondent no.3

CORAM:S.R.SATHE, J.

DATED:1st Sept. 2004

P.C.:-

. Heard the learned advocate for the Applicant as well as Respondents. The applicant is seeking stay to the order dated 22-4-2002 passed by the Additional District Judge,Pune whereby the

Respondent no.1 and its officers are restrained from issuing or from renewing licence of any kind in favour of the Respondent no.2, unless there is strict compliance of rules and laws related to the shop and business. From perusal of this order it is very clear that no specific direction or injunction is issued in respect of use of the land. Moreover in the siad order, there is no blanket injunction against Respondent no.1. The said order only directs that unless strict compliance of rules and laws in existence are made, the license should not be granted. Having regard to the nature of this order there is no necessity to stay the same.

. Hearing of the appeal is expedited and now the matter is fixed for peremptory hearing on 20-9-2004.

. C.A. disposed of accordingly.

. Parties to act on the copy of this order duly authenticated by Sheristedar of the Court.

(S.R.SATHE, J)

At this stage the learned Advocate for the Respondent argued before me that as in the instant case the defendant had not stepped into the witness box, certified copies of the mutation entry as well 7x12 extract produced by the defendant cannot be relied upon. For this proposition he has placed reliance on a case of Vithal Ramrao Ingale (Patil) V/s Navalbai Digambar Deshmukh reported in 2003(1) ALL MR 650 and case of Vitthal Daulat Lad V/s Ashok Govind Tawade reported in 2002(2) ALL MR 691. From perusal of the above cited rulings it is very clear that the facts of the above mentioned cases and facts of case in hand are quite different. In the former case the documents appeared to be some ancient document on which the reliance was placed by the authority when there being any evidence regarding contents of the same. The same is the position in respect of other case. Here in the instant case admittedly the document on which the defendants had placed reliance were to be documents duly authenticated by the concerned Department and produced by the defendant and not only that no objection was taken by other side for the said document. On the contrary the said documents were relied by both the parties and were accepted in evidence by the Court below. There was no

objection for referring the said document or accepting it during the course of trial or during hearing of the first appeal. It is for the first time in the second appeal that objection is being raised that the said documents cannot be read in evidence because the defendants have not stepped into witness box and have proved the contents of those documents viz. 7x12 extract and mutation entry.

. Under these circumstances I that there is no substance in the argument advanced by the learned advocate for the Respondent. It was not at all necessary for the defendants to step into the witness box in order to prove the contents of those mutation entries or any other witness from revenue authority.

. Thus from the above discussion it is very clear that first appellate court has wrongly assumed that entire suit property is joint family property of Mahadu Laxman and his sons, and therefore observations that provisions of section 8 of Hindu Succession Act would be application and considering the provisions with regard of partition he held that each of the plaintiff having 7/20th share in the property described in para 1 of the plaint and

defendants 1 and 2 and 5 and 6 are having share to the extent of 1/24th. The said finding is certainly not correct for the reasons mentioned above. On the contrary, the finding recorded by the trial Court to the effect that so far as the properties mentioned at Sr.No.1 to 3 and 5 to 17 are concerned, the same are not joint family properties and not liable for partition and as such the plaintiff's suit in respect of those properties was rightly dismissed.

. Though the trial Court had observed that so far as the property mentioned at Sr.No.4 and 18 is concerned, the plaintiff is entitled for partition and separate possession, I have already mentioned that even those properties can be recorded as joint family properties of Mahadu and his sons. The said properties are not come to the plaintiff's property from paternal ancestral. In this view of the matter it is necessary to interfere with the finding recorded by the first appellate court and allow the appeal.

. Hence the appeal is allowed. The judgment and order passed by the first appellate Court is set aside. Plaintiff's suit for partition and separate possession is dismissed.

. Under the circumstances of the case parties to
bear their own costs.

. Certified copy expedited.

(S.R.SATHE, J.)